Nachilongo Doreen (W/Zimbabwe) v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–157–06 OF 2012 (ZMB)
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
20 JANUARY 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Trafficking of dangerous drugs — Custody and control — Dangerous drugs contained in bag — Some eight hours gap before appellant collected unlocked bag — Whether appellant had knowledge of drugs found in bag — Whether there was break in the chain of evidence — Whether defence story inherently incredible — Whether evidence sufficient to justify appellant's conviction — Whether trial judge correctly evaluated all evidence and applied correct standard of proof at conclusion of trial — Whether prosecution succeeded in proving case beyond reasonable doubt — Whether conviction safe — Dangerous Drugs Act 1952 ss 2, 37(d) & 39B(1)(a)

The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 1327.4g of methamphetamine at Kuala Lumpur International Airport (KLIA). The learned trial judge found that the appellant was caught red handed pulling the bag that contained the drugs. Coupled with the evidence of the baggage tag, the boarding pass and the books which had the name of the appellant, the learned trial judge found that the bag (P17) belonged to the appellant and that she had custody and control of the bag. Since custody and control had been proven, the learned trial judge ruled that the prosecution was entitled to rely on s 37(d) to presume that the appellant had knowledge of the drugs. Further, relying on the manner the drugs were concealed in P17 and the fact that the appellant was travelling and transporting the drugs from Johannesburg to Malaysia, the learned judge found that the act amounted to trafficking under s 2 of the DDA.The learned trial judge then considered the defence of the appellant that she had come to Malaysia to look for job opportunities and that within the eight hours gap before the appellant collected bag P17, someone could have opened the bag and placed the drugs inside it. Having found that the appellant's defence had not raise a reasonable doubt on the prosecution case, the learned trial judge convicted and sentenced the appellant to death. Hence, the appellant appealed to this court on the following issues: (i) that there was a break in the chain of evidence; and (ii) that at the end of the case, the learned trial judge had applied the wrong standard of proof.

Held, dismissing the appeal:

(1) The prosecution case was one of presumed possession under s 37(d) and

of trafficking under s 2 of the DDA. Looking at the evidence in totality, the prosecution had made out a prima facie case against the appellant and had rightly called upon the appellant to enter her defence. There was no gap in the prosecution case and the learned trial judge was correct in finding that there was custody and control of the bag. Applying s 37(d), the appellant was presumed to have knowledge of the drugs in the bag. Further, the learned trial judge was correct in making a finding of trafficking under s 2 where the appellant was found concealing, carrying and transporting the drugs from Johannesburg to Malaysia, bearing in mind the quantity of the drugs (see para 26).

(2) Both the legal burden on the prosecution to prove its case beyond reasonable doubt and the evidential burden of the accused to raise a reasonable doubt can only be fully discharged at the end of the whole case. Viewed in that context and notwithstanding the words 'prima facie' used by the learned trial judge in the last paragraph of her judgment, the learned trial judge had correctly evaluated all the evidence and had applied the correct standard of proof at the conclusion of the trial ie, that the prosecution had proved its case beyond reasonable doubt, hence her conclusion that the defence had not raised a reasonable doubt on the prosecution case (see para 27).

[Bahasa Malaysia summary

Perayu dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 1327.4g methamphetamine di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA'). Hakim yang bijaksana mendapati bahawa perayu ditangkap semasa menarik beg yang mengandungi dadah tersebut. Bersama dengan keterangan mengenai teg bagasi, pas naik dan buku-buku yang mempunyai nama perayu, hakim yang bijaksana mendapati bahawa beg ('P17') adalah milik perayu dan bahawa dia mempunyai jagaan dan kawalan ke atas beg tersebut. Memandangkan jagaan dan kawalan telah dibuktikan, hakim perbicaraan yang bijaksana memutuskan bahawa pihak pendakwaan berhak untuk bergantung ke atas s 37(d) untuk menganggap perayu mempunyai pengetahuan mengenai dadah tersebut.Selanjutnya, bergantung ke atas cara dadah disembunyikan di dalam P17 dan fakta bahawa perayu dalam perjalanan dan mengangkut dadah dari Johannesburg ke Malaysia, hakim yang bijaksana mendapati bahawa tindakan tersebut menjumlahkan pengedaran di bawah s 2 ADB. Hakim perbicaraan yang bijaksana kemudiannya mempertimbangkan pembelaan perayu bahawa dia datang ke Malaysia untuk mencari peluang pekerjaan dan bahawa dalam jurang masa lapan jam sebelum perayu mengambil beg P17, seseorang boleh membuka beg tersebut dan meletakkan dadah di dalamnya. Dengan mendapati pembelaan perayu tidak membangkitkan keraguan munasabah ke atas kes pihak pendakwaan, hakim perbicaraan yang bijaksana menyabit dan menghukum perayu dengan hukuman mati. Maka, perayu merayu kepada

mahkamah ini atas isu berikutnya: (i) bahawa rantaian keterangan terputus; dan (ii) bahawa pada akhir kes, hakim perbicaraan yang bijaksana telah mengguna pakai standard pembuktian yang salah.

Diputuskan, menolak rayuan:

(1) Kes pihak pendakwaan adalah satu kes mengenai anggapan milikan di bawah s 37(d) dan pengedaran di bawah s 2 ADB. Melihat kepada keterangan secara keseluruhannya, pihak pendakwaan telah membuat kes prima facie terhadap perayu dan telah secara betul memanggil perayu untuk memasuki pembelaannya. Tiada jurang dalam kes pihak pendakwaan dan hakim perbicaraan yang bijaksana betul bahawa terdapat jagaan dan kawalan terhadap beg tersebut. Mengguna pakai s 37(d), perayu dianggap mempunyai pengetahuan mengenai dadah di dalam beg. Selanjutnya, hakim perbicaraan yang bijaksana betul dalam membuat dapatan mengenai pengedaran di bawah s 2 yang mana perayu didapati menyembunyikan, membawa dan mengangkut dadah tersebut dari Johannesburg ke Malaysia, mengambil kira kuantiti dadah tersebut (lihat perenggan 26).

(2) Kedua-dua beban undang-undang ke atas pihak pendakwaan untuk membuktikan kesnya melampaui keraguan munasabah dan beban keterangan tertuduh untuk membangkitkan keraguan munasabah hanya boleh didengar pada akhir keseluruhan kes. Mengambil kira dalam konteks tersebut dan meskipun perkataan 'prima facie' digunakan oleh hakim perbicaraan yang bijaksana di dalam perenggan terakhir penghakimannya, hakim perbicaraan yang bijaksana telah secara betul menilai kesemua keterangan dan telah mengguna pakai standard pembuktian yang betul pada akhir perbicaraan iaitu, bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah, maka kesimpulannya bahawa pembelaan tidak membangkitkan keraguan munasabah ke atas kes pihak pendakwaan (lihat perenggan 27).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
Sia Pang Liong v PP [2013] 2 MLJ 490; [2011] 6 CLJ 759, FC (refd)
Teuku Nawardin Shamsuar v PP [2010] MLJU 249; [2011] 3 CLJ 353, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a)

Appeal from: Criminal Trial No 45A-196 of 2011 (High Court, Shah Alam)

Amrit Pal Singh (Amrit & Co) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 1327.4g of methamphetamine at Kuala Lumpur International Airport (KLIA) on 23 February 2011 at about 3pm.

[2] At the material date and time, Inspector Mohd Zakihani bin Ghuzali (SP3) was on observation duty with 17 other police personnel at Aras 3, KLIA when he saw the appellant 'berjalan dalam keadaan yang mencurigakan'. SP3 stopped the appellant who was pulling a black bag (exh P17) and who had on her shoulder (*disandang*) a white handbag (exh P16) near Carousel F.

[3] SP3 directed the appellant to have the bag, P17 scanned at the PDRM scanner. Seeing images that aroused his suspicion, SP3 then directed the appellant to take the bag to the Narcotics Office, KLIA for further examination.

[4] At the Narcotics Office, a Lance Corporal (*Wanita*) 155085 was directed by SP3 to conduct a search on the appellant's body. Nothing was found on her. The handbag, P16 was examined and except for her identity card and an e-ticket, nothing else was found in the handbag.

[5] SP3 proceeded to examine the bag, P17. The bag was not locked and had a baggage tag in the name of the appellant. The baggage tag and the boarding pass of the appellant (exh P15) show that the appellant had travelled from Johannesburg to KLIA on flight MH204. There were clothes and books in the bag, P17. Five out of the seven books had the name of the appellant on them. Upon removing the clothes and books that were inside the bag, SP3 felt something hard at the base of the bag. Using a knife and with difficulties, SP3 removed the layer (*pelapik*). Attached to the layer was another black layer. SP3 had to use a knife to detach the second layer.

[6] Under both of these layers, SP3 found three packages containing 'bahan Kristal jernih disyaki dadah'. Upon analysis by the chemist (SP2), the substances were found to be methamphetamine in the total weight of 1327.4g.

[7] The learned trial judge found that there was no challenge on the analysis by the chemist that the chain of evidence in respect of the drugs was not broken. Accordingly the learned trial judge ruled that there was no dispute on the identity of the drugs.

[8] The learned trial judge found that the appellant was caught red handed pulling the bag that contained the drugs. Coupled with the evidence of the baggage tag; the boarding pass and the books which had the name of the appellant, the learned trial judge found that bag P17 belonged to the appellant and that she had custody and control of the bag. And since custody and control had been proven, the learned trial judge ruled that the prosecution is entitled to rely on s 37(d) to presume that the appellant had knowledge of the drugs.

[9] Further, relying on the manner the drugs were concealed in P17 and the fact that the appellant was travelling and transporting the drugs from Johannesburg to Malaysia, the learned judge found that the act amounts to trafficking under s 2 of the Act. The cases of *Teuku Nawardin Shamsuar v Public Prosecutor* [2010] MLJU 249; [2011] 3 CLJ 353 and *Sia Pang Liong v Public Prosecutor* [2013] 2 MLJ 490; [2011] 6 CLJ 759 were cited in support of such finding.

[10] All the ingredients required for a charge under s 39B(1)(a) of the Act having been established, the learned trial judge found a prima facie case proven and called the appellant to enter her defence.

THE DEFENCE

[11] The appellant gave evidence under oath. She states that it was her first visit to Malaysia and that her fare and expenses were paid for by her father. According to the appellant, in 2011, she had made plans to come to Malaysia as she was informed by her friends that there are a lot of job opportunities in Malaysia.

[12] The appellant left Zambia on 19 February 2011 for South Africa. When she reached South Africa she contacted her friend Natasha to meet her. Natasha had arranged for the flight and hotel for her. Initially she had brought a small bag with her but after she went shopping with Natasha, her clothes could no longer fit into the small bag. Natasha then gave her a bigger bag, P17.

[13] The bag P17 was not locked. In Johannesburg, the bag was scanned at the airport prior to it being checked in and nothing suspicious was detected in P17. She departed from Johannesburg to Kuala Lumpur on 23 February 2011 and she reached KLIA at about 6.00am. At KLIA, she was detained by the immigration authority for about eight hours. She was only cleared at about 2pm. She then went to an office at KLIA where she had to fill up a form before the management handed over the bag P17 to her.

[14] The learned trial judge had in her mind the principle in *Mat v Public Prosecutor* [1963] 1 MLJ 263 that the story of the defence need not be true or be believed. The learned trial judge considered the defence of the appellant that she came to Malaysia to look for job opportunities and that within the 8 hours gap before the appellant collected bag P17, someone could have opened the bag and placed the drugs inside it.

[15] The following is the finding of the learned trial judge on the defence of looking for a job:

> 3. If the accused really wanted to look for a job in Malaysia, why would she spend a lot of money for flight ticket and other expenses, to travel from Zambia to Malaysia without any preparation for job hunting, while she could save time and cost by eg surfing the internet, make an online application or apply in writing. It is unreasonable for the Accused to claim that she did not know how to do a search in the internet while at the same time she claimed to have graduated from a teaching institution and comes from a middle class family;
>
> 4. What made the Accused's story more improbable is that she claimed to be not proficient in English. However, amongst the items found in her bag (P17) were notebooks with her name written in good English by the Accused herself. When the Learned Deputy Public Prosecutor asked the Accused to read the notebooks, the Accused showed displeasure and reluctantly read the notebooks;
>
> 5. …
>
> 6. The Accused said that if she did not succeed in securing any job in Malaysia, her second choice was to enroll in a local college. However, she admitted that she did not bring any document to support her educational background or her result transcript;
>
> 7. …
>
> 8. The Accused planned to stay in Hilton Hotel during her visit to Malaysia. When the Accused was arrested, she only had an equivalent sum of RM860.00 on her. Why would the Accused choose to stay in a five star hotel and how was she going to pay for her expenses while she was in the process of job hunting;

A

9. The Accused testified that her friends named Esther and David would make arrangements to pay for her expenses and hotel bill or alternatively she would stay in their house in Malaysia. The arrangement should have been made earlier … The story became more improbable as the Accused claimed that Esther and David would pay for her hotel bill, whilst they were only students; and

B

10. Finally, if her intention was to secure a job in Malaysia failing which she would enroll in college, why would she have a return ticket for 1.2.2010 (P16D).

C

[16] On the possibility that somebody could have planted the drugs in bag P17 during the 8 hours gap, the learned trial judge made the following finding:

1. ….

D

2. There is nothing in the Immigration system to suggest that the Accused could be detained for eight hours by the Immigration as she was not blacklisted from entering this country and there were no problems with her passport and e-ticket;

E

3. … There is no reason as to why the prosecution witnesses or anybody should go all out to fix the Accused merely to get the Accused convicted. What would they gain by getting an innocent visitor to the country (assuming the Accused's story were to be believed) charged and if convicted hung for drug trafficking? What could be the motive? …

F

4. Furthermore the drugs were hidden under 'pelapik-pelapik yang dilekatkan dengan gam yang kuat.' If somebody wanted to fix the Accused, they could just easily put the drugs on top of the other items in the bag. There was no necessity to place the drugs well hidden/concealed at the base of the bag;

G

5. Even after she was arrested, the Accused never made an attempt to inform the police with regards to her father or her friends, Natasha, Esther and David. If the Accused was telling the truth, she would have immediately told the police about these people in order to assist in the police investigations and to prove that she is innocent.

H

[17] Having found that the appellant's defence had not raise a reasonable doubt on the prosecution's case, the learned trial judge convicted and sentenced the appellant to death. Hence the appeal.

THE APPEAL

I

[18] Before us, learned counsel for the appellant raised the following issues:

(a) that there was a break in the chain of evidence; and

(b) that at the end of the case, the learned trial judge had applied the wrong standard of proof.

[19] The first issue is the crux of the appeal. It is not in dispute that the appellant arrived in Malaysia on 23 February 2011 at 6.10am but only cleared the immigration at 2.27pm. It is also not in dispute that the bag, P17 was not locked.

[20] It was the submission of learned counsel that the prosecution has failed to explain what happened to this unlocked bag during the eight hours and who handled and managed this bag during the period when the appellant has yet to clear the immigration. There was also no evidence led by the prosecution to show proof of the bag's weight when the appellant checked in at Johannesburg and the weight upon arrival in Malaysia. In short the appellant's case is that the 8 hours' duration had created a gap in the prosecution's case and that the prosecution has not proved custody and control of the bag P17.

[21] On the second issue, learned counsel for the appellant argued that the learned trial judge had applied the wrong standard of proof, warranting the acquittal or retrial of the appellant. Learned counsel made reference to the grounds of judgment of the learned trial judge at the conclusion of the trial wherein the learned trial judge states:

> Since the Prosecution had proven a prima facie case against the Acccused and she had not been able to cast a reasonable doubt in the Prosecution's Case, the Court found that the Prosecution had proven her guilty as charged, convicted and sentenced her to the mandatory sentence of death.

[22] The basis of complaint by the appellant is that under s 182A of the Criminal Procedure Code, the test to be applied at the conclusion of the trial is whether the prosecution had proved its case beyond reasonable doubt whereas the learned trial judge had used the prima facie standard of proof which is the standard to be applied at the conclusion of the prosecution's case.

[23] We found both issues raised by the appellant to be without merits. On the first issue, the defence was that the appellant was detained by the immigration authority for eight hours. Hence, it was submitted that the appellant could not collect the bag and since the bag P17 was not in the possession of the appellant for the duration of eight hours, somebody else could have planted the drugs in the unlocked bag.

[24] Having perused the notes of proceedings, we find that there was no evidence to establish that the appellant was in fact detained by the immigration authority for eight hours. The immigration officer at KLIA (SP5), whilst agreeing that the appellant cleared the immigration point eight hours after her arrival and that she did not collect her bag until she was cleared by the immigration, merely states:

Tidak ada dalam system dia telah ditahan selama 8 jam. Kalau ditahan pun tidak masuk dalam system. Tidak ada sebab dia ditahan sebab semua passport complete dan tiket pun ada. Passport valid.

[25] In any event, the defence of the appellant that the drugs might have been planted by someone else (which is tied up to the issue of the eight hours gap) was duly considered by the learned trial judge.

[26] The prosecution's case is one of presumed possession under s 37(d) and of trafficking under s 2 of the Act. Looking at the evidence in totality, we agree with the learned trial judge that the prosecution has made out a prima facie case against the appellant and has rightly called upon the appellant to enter her defence. It is our view that there was no gap in the prosecution's case and that the learned trial judge was correct in finding that there was custody and control of the bag. Applying s 37(d), the appellant was presumed to have knowledge of the drugs in the bag (see *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1). Further, the learned trial judge was correct in finding trafficking under s 2 where the appellant was found concealing, carrying and transporting the drugs from Johannesburg to Malaysia, bearing in mind the quantity of the drugs (see *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193).

[27] On the second issue raised by the appellant, we are similarly of the view that it is without merits. Both the legal burden on the prosecution to prove its case beyond reasonable doubt and the evidential burden of the accused to raise a reasonable doubt can only be fully discharged at the end of the whole case (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). Viewed in that context and notwithstanding the words 'prima facie' used by the learned trial judge in the last paragraph of her judgment, we find that the learned trial judge had correctly evaluated all the evidence and had applied the correct standard of proof at the conclusion of the trial ie that the prosecution has proved its case beyond reasonable doubt, hence her conclusion that the defence has not raised a reasonable doubt on the prosecution's case.

[28] In the final analysis, it is our view that the conviction against the appellant is safe. We therefore, unanimously dismissed the appeal and affirmed the conviction and sentence by the High Court.

Appeal dismissed.

Reported by Ashgar Ali Ali Mohamed